TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

No. ~~302.~~ 132

THE CITY OF RICHMOND, PLAINTIFF IN ERROR,

vs.

HENRY SMITH, WHO SUES FOR THE USE, ETC., OF ALEXANDER CLENDENIN.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

FILED OCTOBER 28, 1871.

SUPREME COURT OF THE UNITED STATES.

No. 362.

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1 Pleas before the circuit court of the United States for the eastern district of Virginia, at the court-room thereof, in the city of Richmond, in said district, on Tuesday, May 16th, A. D. 1871—present, Hon. Hugh L. Bond, judge presiding.

Style of suit.

HENRY SMITH, A CITIZEN AND INHABITANT of the State of New York, who sues for the benefit and at the costs of Alexander Clendenin, also a citizen and inhabitant of the State of New York, plaintiff,
vs.
THE CITY OF RICHMOND, IN THE STATE OF Virginia, defendant.
} Trespass on the case.

Be it remembered that, heretofore, to wit, in the clerk's office of said court, on the 18th day of February, A. D. 1871, came the plaintiff, by his attorney, and sued out a summons against the said defendant, which summons, with the return of the marshal thereon endorsed, is in the words and figures following, to wit:

2 *Summons.*

Circuit court of the United States of America, eastern district of Virginia, ss:

The President of the United States of America to the marshal of the eastern district of Virginia, greeting:

We command you that you summon the city of Richmond, in the State of Virginia, if it shall be found in your district, to be and appear at the clerk's office of our circuit court of the United States for the eastern district of Virginia, at rules, to be holden at the said clerk's office, in the custom-house, in the city of Richmond, in the district aforesaid, on the first Monday of March next, to answer unto Henry Smith, a citizen and inhabitant of the State of New York, who sues for the benefit and at the cost of Alexander Clendenin, also a citizen and inhabitant of the State of New York, in a plea of trespass on the case, to his damage, as he alleges, of five thousand dollars, and have you then and there this writ.

Witness the Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States of America, at Richmond, this 18th
3 day of February, in the year of our Lord one thousand eight hundred and seventy-one, and of our independence the 95 year.

[SEAL.] M. F. PLEASANTS, *Clerk.*

Return.

Executed this 18th day of February, 1871, by delivering to A. M. Keiley, mayor of the city of Richmond, V'a, the within-named defendant, in person, a true copy of this writ.

E. D. FITCH,
Deputy Marshal.

And, at another day, to wit, at rules held in the clerk's office of said court, on the 1st Monday in March, 1871.

This day came the plaintiff, by his attorney, and filed his declaration and bill of particulars in this case, which are in the words and figures following, to wit:

Declaration.

VIRGINIA:

In the circuit court of the United States for the district of Virginia.

CITY OF RICHMOND, *to wit:*

Henry Smith, a citizen and inhabitant of the State of New
4 York, who sues for the benefit and at the costs of A. Clendinan, also a citizen and inhabitant of the State of New York, complains of The City Richmond, in the State of Virginia, of a plea of trespass on the case, for that, whereas, on the second day of April, 1865, in the then condition of the government and army of what were then called the Confederate States of America, and in contemplation of the said army giving way to the Army of the United States of America, there was held in the said city a meeting of the council of the said city for what was then considered a work of necessity, and at the said meeting the council of said city adopted certain resolutions which were and are in substance and effect as follows:

1. *Resolved*, That it is the imperative duty of this council, in case of the evacuation of this city by the government and army, to provide, as far as it can, for the immediate destruction of the stock of liquor in the city.

2. *Resolved*, That a committee of twenty-five citizens in each ward be appointed by the president, to act on behalf of the city, and proceed at once to accomplish this object, that said committee destroy, on
5 the premises, all the liquor they can find, giving receipts for the same to the holders.

3. *Resolved*, That the faith of the city be, and is hereby, pledged for the payment of the value of all liquor so destroyed to the holders of said receipts.

And the plaintiff avers that, during the evening of the same second day of April, 1865, and the morning of the next day, there did occur such evacuation of the said city by the government and army, as was contemplated by the first of said resolutions; and that a committee was appointed, according to the second of said resolutions; and that, on the third day of April, 1865, said committee did, in pursuance of said second resolution, destroy on the premises a large quantity of liquor found by them, and in most of the cases did give receipts for the same to the holders; and among the liquor so destroyed, and for which no receipts were so given, was a large quantity of whiskey, brandy, rum, and alcohol, to wit: 11 barrels of fine whiskey, containing 440 gals., worth, at the least, $3 75 per gallon; forty gals. fine whiskey, in demijohns and bottles, worth, at least, $3 75 per gallon; four barrels of apple brandy, containing one hundred and forty-four gallons, worth, at
6 least, $3 00 per gal.; two ⅛ pipes of fine French brandy, containing 25 gallons each, and two demijohns of fine French brandy, containing five gallons each, worth, at least, $10 per gallon; the total value of all which liquors amounts to the sum of $2,832 00, whereof the plaintiff was before, and at the time of such destruction, lawfully possessed as of his own property, by means whereof the faith of the said city was, and is, pledged for the value of all the said liquor of the

plaintiff so destroyed, to the plaintiff, which value amounts to a large sum of money, to wit, to the sum of $2,832 00, of all which the defendant heretofore, to wit, on the third day of April, 1865, had due notice; by reason whereof the defendant became liable to pay to the plaintiff the said value, amounting, as aforesaid, to a large sum of money, to wit, the sum last specified; and, being so liable, the said defendant, in consideration thereof, afterwards, to wit, on the day and in the year last mentioned, undertook and promised to pay him the same when the said defendant should be thereto afterwards requested.

And whereas also, the defendant afterwards, to wit, on the 3d
7 day of April, 1865, was indebted to the plaintiff in the further sum of $2,832 00, for the value of whiskey, brandy, and other goods then and there bargained and sold by the plaintiff to the defendant at its request, and, at its request, delivered by the plaintiff to the agent of the defendant in that behalf; and in the further sum of $2,832 for money then and there lent by the plaintiff to the defendant, at its request; and in the further sum of $2,832 for money found due from the defendant to the plaintiff on an account then and there stated between them; and, being so indebted, the defendant afterwards, to wit, on the day and year last aforesaid, in consideration of the premises respectively, then and there promised the plaintiff to pay the said several sums respectively to the plaintiff on request. Nevertheless, the defendant has disregarded all of the said promises and undertakings in this declaration mentioned, and has not paid the said sums of money, or either of them, or any part of either of them, to the damage of the plaintiff, $5,000. And therefore he brings his suit, &c.

JOHN O. STEGER, *P. Q.*

The following is the bill of particulars filed with the foregoing declaration:

8 *Bill of particulars.*

City of Richmond to Henry Smith, Dr.

1865. Ap'l 3d.	To 11 bls. fine whiskey, destroyed by order of the council, containing 440 gals., at $3 75 p'r gal....	$1,650 00
	To 40 gals. fine whiskey, in demijohns & bottles, at $3 75 p. gal.	$150 00
	To 4 bls. apple brandy, containing 144 gals., at $3 00 per gal.	$432 00
	To 2¼ pipes of fine French brandy, containing 25 gals. each, at $10 p'r gal.	$500 00
	To 2 demijohns of fine French brandy, containing 5 gals. each, at $10.....	$100 00
		$2,832 00
	Int. on same from Ap'l 3, 1865, to	

Common order.

Thereupon the defendant, not appearing, it is ordered that judgment be entered against said defendant for the damages said plaintiff has sustained by the non-performance by the defendant of the promise and assumption in the plaintiff's declaration mentioned, unless said defendant shall appear and plead to issue at the next rules.

9 At which day, to wit, at rules held as aforesaid, on the first Monday in March, A. D. 1871—

Common order confirmed.

Came the plaintiff, by his attorney, and, the defendant not appearing, it is ordered that the plaintiff's damages be ascertained by a jury at the next term.

And at another day, to wit, at a circuit court of the United States for the eastern district of Virginia, held at the court-room thereof, in the city of Richmond, in said district, on Tuesday, May 16th, 1871—

Demurrer.

This day came the parties, by their attorneys, and the defendant, by counsel, demurred to the special count in the plaintiff's declaration.

Joinder.

In which demurrer the plaintiff joins.

Dem'r over'd.

And the same being argued, it is considered by the court that said demurrer be overruled.

Thereupon the defendant asked leave to file a special plea, to which the plaintiff demurs, and the defendant joins in said demurrer, and the argument of counsel being fully heard, the court is of opinion that said demurrer be sustained.

Jury waived.

Thereupon the parties waiving an intervention of a jury submitted the case to the decision of the court.

10 Whereupon the court rendered the following decision:

Judgment.

This cause having been submitted to the court for determination by agreement in writing, by counsel waiving the intervention of a jury, the court finds the facts for the plaintiff, and gives judgment that the plaintiff recover of the defendant the sum of two thousand eight hundred and thirty-two dollars, with interest thereon at the rate of six per centum per annum from the third day of April, eighteen hundred and sixty-five till paid, and costs.

HUGH L. BOND, *Judge, &c.*

Exceptions taken.

MEMO.—To the opinions of the court this day given against the defendant, they, by their counsel, excepted, and tendered their bill of exceptions, which was received, signed, and sealed by the court, and ordered to be made a part of the record in this cause.

Bill of exceptions.

Be it remembered that, upon the calling of this cause for trial, it was agreed, on behalf of the plaintiff and defendant, by their counsel,
11 to waive a trial of said cause by a jury, and to submit all questions of law and fact arising on the trial of the same to the decision of the court, with authority to draw all the inferences and conclusions that a jury is authorized to draw from the evidence, and with liberty to either party to except to the judgment of the court in the same manner and to the same extent that he might except to a verdict of a jury, and with the right to appeal from the same.

Agreement.

It is agreed in this case between the plaintiff and defendant, by their counsel, to waive a trial by jury of this cause, and to submit all questions of law and fact arising on the trial of the same to the decision of the court, with authority to draw all the inferences and conclusions that a jury is authorized to draw from the evidence, and with liberty to either party to except to the judgment of the court in the same manner and to the same extent that he might except to the verdict of a jury, and to object to the same for the same reasons, and with the right to appeal from the same.

JNO. O. STEGER,
For Plaintiff.
JNO. A. MEREDITH,
For Def't.

12 And thereupon the defendant demurred to the first count of the declaration, and the plaintiff joined in the same, which demurrer the court overruled.

Demurrer.

And the said defendant, by John A. Meredith, its attorney, comes and defends the wrong and injury, when, &c., and says that the said first count of the said declaration and the matters therein contained, in manner and form as the same are above stated & set forth are not sufficient in law for the said plaintiff to have or maintain his aforesaid action thereof against the said defendant, and that he, the said defendant, is not bound by law to answer the same; and this he is ready to verify, wherefore, by reason of the insufficiency of said court in this behalf, the said defendant prays judgment, and that said plaintiff may be barred from having or maintaining his aforesaid action thereon against him, &c., &c.

THE CITY OF RICHMOND,
By Counsel.

And then the defendant tendered a plea of the general issue and a special plea, and the plaintiff took issue on the general issue and
13 demurred to the special plea, & the defendant joined in said demurrer; which demurrer the court sustained, and rejected the said special plea.

Special plea.

1. And the said defendant comes and defends the wrong and injury,

when, &c., and says that it did not undertake or promise, in manner & form as the said plaintiff hath above thereof complained against it; and of this it puts itself upon the country.

Special plea.

2. And for a further plea in this behalf the said defendant says that, before and on the said 2d day of April, 1865, the said City of Richmond was in possession and under the control of the confederate government, and that on said day it was determined by the said government to evacuate said city and to leave it to be taken possession of and to be occupied by the troops of the Federal Army, who were then within a few miles of said city and seeking to obtain possession of the same; that said city was evacuated on that day by the confederate government, and was at an early hour of the following morning occupied and possessed by the Federal Army; that with a view to prevent disorder among its own
14 citizens and irregularities by the soldiers of the Federal Army, the council of the said city, on the day aforesaid, resolved to destroy on the premises all the liquor they could find, giving receipts for the same to the holders of said liquors, and pledged the faith of said city for the payment of the value of all liquors destroyed to the holders of said receipts, and thereupon appointed a committee in each ward for that purpose, and that two of said committee did visit the premises of the plaintiff, situated in said city, and did thereon destroy certain liquors belonging to him, without giving any receipt therefor; that, at the time of the destruction of the liquor of the plaintiff as aforesaid, and long prior thereto, it had been determined by the said confederate government to set fire to the tobacco warehouses and other buildings in said city, upon the evacuation of said city, against the protest and remonstrance of said council, and this determination was well known to all citizens thereof, and that one of said warehouses was situated near the premises of said plaintiff. That, in pursuance of said determination the said confederate government did, on the day aforesaid, set fire to the said warehouses
15 and other buildings, whereby a large part of said city, including the premises of the plaintiff, and all the buildings surrounding said premises for several squares distant on every side, and all the property on the premises of said plaintiff were destroyed by fire; and that said city had no means by which it could arrest and extinguish said fire; and that at the instant when the said committee were destroying said liquor, the house of said plaintiff, in which said liquor was stored, was about to take fire, and did in a short time thereafter actually take fire and was consumed, and that said liquors would have been consumed therein, as the said plaintiff was wholly unable to remove the same: and the defendant avers that the liquor of the plaintiff so destroyed by the committee as aforesaid would, if the same had not been so destroyed by the committee, have been consumed by the said fire; and that by reason thereof the liquor was of no value to the plaintiff, and by its destruction as aforesaid the said plaintiff has sustained no loss—and this he is ready to verify.

Demurrer to special plea.

The plaintiff says that the second plea of the defendant is insuf-
16 ficient in law, and he therefore demurs to the same.

HENRY SMITH,
Who sues, &c., by Counsel.

And thereupon the plaintiff to sustain the issue on his part offered and read to the court the following depositions and the resolutions of the city council of 2d April, 1865.

The following are the depositions referred to. The resolutions of the city council of 2d April, 1865, having been previously copied are not here inserted.

17 *Depositions.*

To the City of Richmond:

Take notice that, on the 13th day of April, A. D. 1871, between the hours of 9 a. m. and 6 p. m., at the law office of George P. Androus, esq., No. 16 Exchange Place, in the city of New York, I shall proceed to take the deposition of Ro. A. Lancaster, Henry Smith, Michael Finnegan, and others, to be read in evidence for me in a suit now pending in the circuit court of the United States for the eastern district of Virginia, wherein Henry Smith, who sues, &c., is plaintiff, and you are defendant. And if, from any cause, the taking of such depositions be not commenced, or being commenced shall not be completed, on that day, the taking of the same will be adjourned from time to time until compieted.

Yours resp't'ly,

HENRY SMITH,
Who sues, &c., by counsel.

I acknowledge service of the within notice.
April 3d, 1871.

JOHN A. MEREDITH,
City Attorney.

18 UNITED STATES OF AMERICA,
District of Virginia, ss:

The United States of America to George P. Androus, greeting:

We, reposing special confidence in your fidelity and provident circumspection, do hereby authorize and appoint you to take the testimony, in writing, of Robert A. Lancaster, Henry Smith, Michael Finnegan, and others, whom you are hereby authorized and required to bring before you, at such time and place as you may designate and appoint for that purpose, and that at such time and place you will proceed to examine, under oath, said witnesses, at the instance of the plaintiff in a certain cause now pending and undetermined in our circuit court of the United States for the eastern district of Virginia, before the judge thereof, wherein Henry Smith, who sues for the benefit and at the cost of Alexander Clendenin, is plaintiff, and The City of Richmond is defendant.

19 The answers of the witnesses to such questions as may be propounded to them you will cause to be reduced to writing, in the order in which they shall be answered, and shall then be signed by said witnesses. At the foot thereof, you will add a certificate subscribed by yourself, stating that it was sworn to and subscribed by said witnesses and the time and place when and where the same were taken; which said examination of said witnesses so taken, with your certificate thereto attached, you will send directed to our clerk of our circuit court of the United States for the eastern district of Virginia, sealed, with the names of the parties litigant endorsed thereupon, with early dispatch, together with this writ.

Witness the Hon. Hugh L. Bond, judge of the circuit court of the United States of America, at Richmond, Virginia, this 5th day of April, in the year of our Lord one thousand eight hundred and seventy-one, and of our independence the 95th.

[SEAL.] M. F. PLEASANTS, *Clerk.*

20 UNITED STATES OF AMERICA:

Circuit court for the eastern district of Virginia.

Before Hon. Hugh L. Bond, judge.

HENRY SMITH, (WHO SUES FOR THE BENEFIT and at the cost of Alexander Clendenin,) *against* THE CITY OF RICHMOND.

Pursuant to the commission directed to me in this cause to take testimony herein, which commission is dated April 5th, 1871, and hereunto annexed, appeared the following witnesses, who, being first duly sworn, testified as follows, on this 13th day of April, at my office, No. 16, Exchange Place, in New York City, at 2 p. m., being the time and place appointed by me under said commission and the notice thereto attached.

ROBERT A. LANCASTER, being first duly sworn, testifies as follows:

Q. Where do you live?

Ans. In New York City.

21 Q. Where did you reside in April, 1865?

A. At Richmond City, Virginia.

Q. Do you know Mr. Henry Smith the plaintiff in this action?

A. I do. He kept a liquor store and bar-room in Richmond City on the corner of Carey and Virginia street, in April, 1865, and prior to that time?

Q. Did you make any domiciliary visits during this time to the store of the plaintiff, Henry Smith, and for what purpose and by whose authority?

A. I did. I was one of the committee appointed by the common council of the city of Richmond to destroy all the liquor to be found in the city of Richmond on the night before the evacuation of the city of Richmond by the confederate army under the command of General Lee and I remember distinctly that the committee destroyed all the liquor, which they could find in Henry Smith's establishment, but I do

22 not remember as to the quantity and I do not remember whether any receipt was given or not. I do not remember that any receipt was given. I am, tho', under the impression that we were in such great hurry that no receipt was asked or given. I do not know what was destroyed but we destroyed everything in the shape of liquors which we could find.

RO. A. LANCASTER.

Sworn to and subscribed before me this 13th day of April, 1871, at 16 Exchange Place, New York City, at 3 p. m.

GEO. P. ANDROUS,
Commissioner, &c.

16 EXCHANGE PLACE, *April* 13, 1871—3 *p. m.*

HENRY SMITH, being first duly sworn, testified as follows:

Q. Where do you reside.

Answer. At Fort Lee, New Jersey.

Q. Where did you reside on or about the 1st of April, 1865.

A. At Richmond, Virginia.

Q. What was your business and where was your place of business at that time.

23 A. My business was wholesale and retail liquor business and keeping a bar at the corner of Carey and Virginia streets, in the city of Richmond, in the State of Virginia.

Q. While so conducting business in the city of Richmond were you visited by a committee of the common council or corporation of Richmond? And if so, state what they did.

A. On morning of the 2nd of April, or the morning of the evacuation of Richmond by the confederate army, my place was visited by a committee appointed by the common council of the city of Richmond to destroy all the spirit'ous liquors which they could find in Richmond City. They came about an hour or two before sunrise to my place and demanded of me that I should shew them my stock of liquors. I asked them by what authority they came. They told me that they were

24 authorized by the city council of Richmond to destroy all liquors which they might find in the city, to prevent the same from getting into the hands of the enemy or the mob. I shewed them my liquors and submitted to their authority. They removed all my liquors in said store whether in barrels, demijohns, or bottles, to the street, and emptied the same into the gutters.

Q. State what the committee destroyed, article by article, and the value thereof.

Answer. Twelve (12) barrels of fine whiskey, containing forty (40) gallons in each barrel, which were worth three dollars and seventy-five per gallon, ($3 75;) also, four barrels of apple brandy, containing thirty-six gallons in each barrel, which were worth three dollars ($3 00) per gallon; also, two (2) one-eighth (⅛) casks of French brandy, containing twenty-five gallons each, which were worth ten dollars ($10 00) per gallon; also, two (2) demijohns of the same French

25 brandy, containing five gallons each, worth the same price of ten dollars ($10 00) per gallon; and also, some bottles of various liquors belonging to the bar, the exact quantity of which I am unable to state.

Q. Did you ever get any receipt from the committee who destroyed these liquors?

Answer. I did not. At the time I did not demand a receipt from them, nor did they offer to give me one. In fact the confusion and hurry at the time was so great that, perhaps, no one thought of it. Since the time of the destruction of the liquors, in April, 1866, or thereabouts, I made application, through my lawyer, Gustavus Meyers, for payment, to the corporation of the city of Richmond. At that time one William B. Jones had commenced action against the city for like destruction of liquors, and I was informed by my counsel that this action would

26 be regarded as a test case, and that he was, as he informed me, informed and instructed by one of the committees of the common council having charge of these claims, that he had best abide or await the decision of the courts in the case of Jones & Co. against The City of Richmond.

Q. Do you know who constituted the committee to destroy the liquors as above-mentioned?

A. I recollect Mr. Robert A. Lancaster, George D. Yancey, (since deceased,) and Soloman Davis, who came to my place as such committee, and I understood at the time that other members of the committee were deputed to visit and destroy liquors at other places in the city.

Q. Have you taken any further action to procure your claim against The City of Richmond than as you have already mentioned?

A. Before a determination as to the liability of The City of Richmond had been had in the case of Jones & Co., I had left the State
27 and have been absent ever since. On the 3d day of January, 1870, for a valuable consideration, I had assigned my claim and all interest therein to Alexander Clendenin, now of New York City, in whose interest and at whose cost the same is now prosecuted.

Q. Look at paper purporting to be an assignment from Henry Smith to Alexander Clendenin, and marked Exhibit A in this cause, and say who executed that paper.

A. I, Henry Smith, the party therein named, signed and delivered that paper to Alexander Clendenin therein named, for the consideration and purposes therein expressed.

Q. Do you know any other matter or thing pertaining to this cause which you have not already stated or explained?

A. Nothing more that I can think of, excepting that there were several other persons who were cognizant of the facts to which I
28 have testified, namely, William H. McGroin, Michael Fenigan, Washington Johnson, (colored man,) and another man, whose name, I think, is Benjamin Johnston, who was one of my bar-keepers at that *the* time, and Frederick Tollander, who was my book-keeper at the time of the destruction, and some others whose names I cannot remember, and some of whom I cannot find.

HENRY SMITH.

Sworn to and subscribed before me this 13 day of April, 1871, at 16 Exchange Place, New York City.

GEO. P. ANDROUS,
Commissioner, &c.

APRIL 13, 1871—4¼ *p. m.*

The further examination of witnesses under this commission was here adjourned to be continued to-morrow, the 14th inst., at 9 o'clock, a. m., at same place.

APRIL 14, 1871—10 *a. m.*

No witnesses appearing to be examined, I hereby adjourn this matter to Saturday, the 15th inst., at 9 a. m., at same place.

29 APRIL, 15, 1871—9 *a. m.*

No witnesses appearing to be examined, I hereby adjourn this matter to Monday next, the 17th inst., at 2 p. m., having waited until 10 a. m., at No. 16 Exchange Place, New York City.

2 P. M., APRIL 17, '71.

FREDERICK CALENDER, being duly sworn, testifies as follows:

Q. Where do you reside?

A. Philadelphia.

Q. Where did you reside in April, 1865?

A. In Richmond, Virginia.

Q. Do you know Mr. Henry Smith, and his place of business at that time?

A. Mr. Smith was at that time in business in wholesale and retail liquors, flour, and groceries. I was his book-keeper.

Q. While you were in Mr. Smith's employment do you know of any visitation of a committee from the common council of the city of Richmond; and, if so, state what the committee did, and at what
30 time they made their visit?

Answer. The committee paid Mr. Smith's place a visit just before the evacuation of Richmond. That was the day before the evacuation—I believe it was on the 2d day of April. It was before daylight—about 2 hours. The committee came into Mr. Smith's place and took all the bottles, demijohns, and barrels out, and you could not get even a drink unless you drank it from the gutter. They destroyed 12 barrels of fine whiskey, containing 40 gallons each, worth easily, at least calculation, $3 75 per gallon; also, 4 barrels of apple brandy or apple jack, containing at least 35 gallons per barrel, which was worth, at least, $3 00 per gallon, and there was also two one-eighth casks of French brandy or Cogniac, containing together, about fifty gallons, which were worth about $10 00 per gallon. There must have been
31 besides this, at least $100 00 worth of various liquors in bottles and demijohns, which were kept filled and used to serve the bar.

Q. Do you know of any other matter or thing pertaining to this matter of difference between Mr. Smith and The City of Richmond; and, if so state it?

A. I believe I have stated every thing that I know of, to my best knowledge.

FRED. CALENDER.

Sworn to and subscribed before me, at my office, No. 16 Exchange Place, New York City.

GEO. P. ANDROUS,
Commissioner.

APRIL 17—3 *p. m.*

There being no other witnesses present to be examined, the further examination of witnesses under this commission is adjourned to April 18, 1871, at 2 p. m., at No. 112 Front street, New York City.

APRIL 18, 1871—2 *p. m.*

THOMAS SCHMIDT, being first duly sworn, testifies as follows:

32 Q. Where do you reside, and what is your business?

A. I reside in the city of Brooklyn, State of New York; my place of business is No. 112 Front street, in the city of New York. I am secretary to the Danish consulate at the city of New York.

Q. Look at the paper purporting to be an assignment from Henry Smith to Alexander Clendenin, and say whether you are the subscribing witness thereto (paper marked Exhibit A.)

A. Yes; I am the subscribing witness thereto. I know Mr. Henry Smith, the party who signed and executed this paper, and he signed, executed, and delivered the same in my presence and acknowledged before me that he did so for the purposes therein mentioned.

THOMAS SCHMIDT.

Sworn to and subscribed before me, this 18th day of April, 1871, at No. 112 Front street, New York City.

GEO. P. ANDROUS,
Commissioner.

33 APRIL 18, 1871—3 *p. m.*

There being no other witness present to be examined under this commission, the further examination of witnesses hereunder is adjourned to April 19, 1871, at 2 p. m., at No. 16 Exchange Place, New York City.

APRIL 19, 1871.

There being no witnesses present from 2 p. m. to 3½ p. m., the examination of witnesses under this commission is hereby adjourned to 12 m., April 20, 1871, at No. 16 Exchange Place, New York City.

APRIL 20, 1871.

There being no witnesses present for examination, from 12 m. to 4 p. m., the further examination of witnesses under this commission is hereby adjourned to 9 a. m., April 21, 1871, at No. 16 Exchange Place, New York City.

APRIL 21, 9 *a. m.*

MARY MILLER, being first duly sworn, testifies as follows:

Q. What is your name and residence?

34 A. My name is Mary Miller; I am the wife of Charles Miller, and our present residence is at No. 60 Canal street, in the city of New York.

Q. Where did you reside in the year 1865, and what business did yourself and husband then follow?

A. I came to Richmond with my husband a year before the war broke out between the North and the South; we kept a wholesale and retail bakery at Richmond, in Main street, Richmond City, between 18th and 19th streets, from the time we came to Richmond to about two years after the war.

Q. Were you acquainted with Mr. Henry Smith, the plaintiff in this action, in April, 1865, or during the time of the evacuation of Richmond by the confederate forces? And if so, state what his business was at that time, and where his place of business was.

35 A. I was well acquainted with Mr. Smith at that time, and long before—we used to have large dealings together in flour and other provisions, and at the time of the evacuation of Richmond we had a large quantity of tobacco in store at his place. Mr. Smith was a wholesale and retail dealer in liquors at that time, and his place of business was at that time at the corner of Carey and Virginia streets, in Richmond; and he also, at that time, dealt by way of speculation, in flour and other provisions.

Q. Do you know of any persons or parties coming to the store of Mr. Smith and taking possession of the liquors there? And if so, state when, and what was done.

A. About 5 o'clock in the morning of the day of evacuation—which was Monday, and if I recollect right it was on the 3d day of April, 1865—I was passing Mr. Smith's place, and I saw parties rolling

36 out barrels of liquor into the street and knock the heads in with axes and let them flow along the gutter. There were big barrels

and small barrels and demijohns and bottles brought out and broken and emptied in the street—this was going on before the entry of the Northern troops into the city, and was being done at many other places at the same time, besides Mr. Smith's. I am unable to say how many barrels or demijohns or bottles there were broken and emptied into the street, but I should think there were at least 18 or 20 barrels, big and little, from what I saw, and from my previous acquaintance with Mr. Smith's store. Mr. Smith kept one of the finest places in Richmond—a fine saloon for retail business—and he kept the best of wines and liquors to be had in Richmond, both in wholesale and retail?

Q. Do you know who the parties were who were engaged in the destruction of these liquors?

37 A. I know that they were men connected with the common council—their officers, and police or agents. They came in the name of the common council, and said that they were ordered to destroy all liquors in Richmond in order that the Northern Army might not get hold of them and do injury and destruction in the city. I was acquainted with the faces of many of them, but do not recollect their names. I should know them if I saw them.

Q. Do you know of any other matter or thing concerning this matter of difference between Mr. Smith and The City of Richmond, which you have not stated? And if so, say what it is.

Answer. I can say nothing more except that I know, at the time of this destruction of liquors, the same was ordered by the mayor and common council of Richmond, and that the same were destroyed

38 by their action, and was flowing—not by the enemy. I can think of nothing more, except that I came out and went to Smith's to see how our tobacco was getting along—whether they were removing that also, and to find out what I had best do about it. I can think of nothing more at present.

MARI MILLER.

Sworn to before me and subscribed before me this 21st day of April, 1871, 11 a. m., at 16 Exchange Place, New York City.

GEO. P. ANDROUS,
Commissioner.

APRIL 21ST, 1871—11 *a. m.*

There being no further witnesses present to be examined under this commission, the further examination of witnesses is hereby adjourned to to-morrow, Saturday, April 22, 1871, at 12 m., at same place, (No. 16 Exchange Place, New York City.)

APRIL 22, 1871—12 *m.*

There being no witnesses present to be examined under this commission, the further examination of witnesses is hereby adjour'ed

39 to Monday, April 24, at 4 p. m., at No. 15 New street, in the city of New York.

15 NEW STREET, N. Y.—4 *p. m.*

SOLOMON DAVIS, being first duly sworn, testifies as follows:

Q. Where do you reside, and what is your business?

A. Reside in New York, and am a broker at No. 15 New street, New York.

Q. Where did you reside in April, 1865?

A. In Richmond, Virginia.

Q. Were you one of a committee appointed by the mayor and common council, on or about the time of the evacuation, to destroy all spirituous liquors to be found in the city of Richmond?

A. We were appointed to go out and destroy what spirituous liquors we could find.

Q. Do you know Mr. Henry Smith, of Richmond? And if so, state where his place of business was, and what his business was.

40 A. Well, I know Mr. Smith; he informed me that he kept a liquor store at corner of Carey and Virginia streets, in the city of Richmond.

Q. Do you know of the destruction of any liquors at the store corner of Cary and Virginia streets, (which you have been informed was occupied by Smith,) on the morning of the evacuation of Richmond by the confederate forces?

A. Yes, sir. I was one of the committee appointed, as I have already said, to see to the destruction of liquors in the city, to prevent them from falling into the hands of the enemy and the mob, but I did not go into Mr. Smith's place. I had occasion to pass there, and I saw some liquor being destroyed, and running down the sidewalk; it was running into the gutter. I do not know how much was destroyed, nor what the articles were. The liquor had been spilt out at the store door, and

41 was flowing over the sidewalk towards the gutter—part of the contents of a barrel. I did not stay there five minutes. I was not there at the time Mr. Smith's store was entered and his liquors destroyed.

Q. Do you know any other matter or thing concerning this matter of difference between Henry Smith and The City of Richmond which you have not stated? And if so, state what you know.

A. I know nothing more than I have stated.

SOLOMON DAVIS.

Sworn and subscribed before me this 24 day of April, 1871, 4½ p. m., at No. 15 New street, New York City.

GEO. P. ANDROUS,
Commissioner.

There being no further witnesses present for examination, the further examination of witnesses is hereby adjourned to Tuesday, the 25th day of April, 1871, at 11 a. m., to 16 Exchange Place, New York City.

42 APRIL 25TH, 1871—11 *a. m.*

WASHINGTON JOHNSON, being first duly sworn, testifies as follows:

Q. Where do you reside?

A. In New York City, and did reside until recently in Boston, Massachusetts.

Q. Where did you reside it April, 1865?

A. I resided in Richmond; I was there in the employment of Mr. Henry Smith, at the corner of Carey and Virginia streets, in that city; I was an under bar-keeper.

Q. State what kind of a store or place Mr. Smith then kept.

A. It was a liquor store, wholesale and retail; there were two bars for retail business, one in front of the premises, and the other in the rear or side of the premises; the last fronting on Virginia street.

Q. Where was the wholesale business conducted?

43 A. It was conducted on the same floor. The floor was seventy-four feet in length by 30 feet, or thereabouts.

Q. Do you recollect the morning of the evacuation by the confederate forces of the city of Richmond?

A. Yes; it was on a Monday morning; the 3d of April, 1865, as near as I can recollect.

Q. Was there any visitation to Mr. Smith's premises on that morning by parties or persons purporting to be a committee from the mayor and common council of the city of Richmond? And if so, state what they did and who they were.

A. There was a visitation by persons acting as such committee; the gentlemen whom I saw or recollect seeing, were Mr. Robert A. Lancaster and Mr. Yancy—I do not know his first name. They came, as
44 they said, by virtue of an order from the corporate authorities of the city of Richmond, to destroy all spirit'ous liquors, so that they should not fall into the hands of the Yankees or any mob.

Q. What did the committee and their agents do at Mr. Smith's place?

A. They came into our place about 5 o'clock in the morning and took possession of the place, and rolled out into the street or on the sidewalk all the barrels containing liquors in the place, and broke in the heads of the barrels with axes, and emptied the liquors on the sidewalk and into the gutters. They also took out all the demijohns and bottles which were behind the bars in the place, and broke them in the street. They required me to help them, and I was forced to assist. This was, as I have said, on the morning of the 3d of April, 1865.

45 Q. Do you know, and if so state, how many barrels of liquor were destroyed, or what was destroyed, whether in barrels, demijohns, or bottles.

A. As far as I can recollect there were about sixteen or 18 barrels of whiskey and brandies taken out and destroyed, besides what liquors were in demijohns and bottles.

Q. What was the whiskey worth per gallon at that time?

A. It was worth at that time at least $4 00 per gallon by wholesale. I paid as high as $5 a bottle for good whiskey, for a gentleman who required it, immediately after the evacuation of Richmond.

Q. What were brandies worth?

A. Apple brandies were worth 3 50 a gallon, and French brandies at least $10 00 per gallon.

Q. Did they gut the whole place?

A. They did. They took everything out; everything that contained liquors.

46 Q. Were you familiar with the price of liquors at that time at Richmond?

A. I was; knew the price of everything in that line. I had been in the employment of Mr. Smith over two years, and was accustomed to and acquainted with the price or value of liquors from day to day.

Q. Do you know of any other matter or thing concerning this matter of difference between Henry Smith and The City of Richmond which you have not stated? And if so, state the same, or what you know.

A. No, sir; I can think of nothing more at present.

his
WASHINGTON + JOHNSON.
mark.

Sworn to and subscribed before me this 25th day of April, at 12 m., at No. 16 Exchange Place, New York City.

GEO. P. ANDROUS,
Commissioner.

47 UNITED STATES OF AMERICA:

Circuit court for the eastern district of Virginia.

HENRY SMITH, WHO SUES, &C.,
vs.
THE CITY OF RICHMOND.

I, George P. Androus, the commissioner appointed by the Hon. Hugh L. Bond, judge of said circuit, to take the testimony of witnesses under the "dedimus" or commission issued in this action, do hereby certify that the foregoing depositions by the witnesses therein respectively named were taken and subscribed by them at the times and places as above severally noted on my minutes of said depositions.

Dated at 16 Exchange Place, New York City, this 26th day of April, 1871.

GEO. P. ANDROUS,
Commissioner.

48 Know all men by these presents that I, Henry Smith, formerly of the city of Richmond, Va., and now of New York City, N. Y., for value received, have sold, and by these presents do grant, assign, and convey unto Alex. Clendenin, of the city of New York, all my right, title, and claim against the city of Richmond, for various liquors destroyed by order of the authorities of said city, previous to evacuation of said city by confederate forces in April, 1865, said liquors being destroyed at the corner of Carey and Virginia streets, in Richmond, and being & valued as follows, viz:

12 bar. whiskey,	480 gal.,	$3 75	.....	$1,800 00
4 " ap. brandy,	144 "	3	.....	432 00
2½ pipes F'ch "	50 "	10	.....	500 00
10 gal. in demijohns,		10	.....	100 00
				$2,832 00

To have and to hold the same unto the said Alex. Clendenin, his executors, administrators, and assigns, forever, to and for the use
49 of him, hereby constituting and appointing him, , my true and lawful attorney, irrevocable, in name, place, and stead, for the purpose aforesaid, to ask, demand, sue for, attach, levy, recover, and receive all such sum and sums of money which now are, or may hereafter become, due, owing, and payable for or on account of all or any of the accounts, dues, debts, and demands above assigned, against the city of Richmond, Virginia, giving and granting unto the said attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary, as fully to all intents and purposes, as might or could do, if personally present, with full power of substitution and revocation, hereby ratifying and confirming all that the said attorney or substibute shall lawfully do, or cause to be done, by virtue hereof.

50 In witness whereof I have hereunto set my hand and seal the third day of January, one thousand eight hundred and seventy.

HENRY SMITH.

Sealed and delivered in the presence of—
THOMAS SCHMIDT.

STATE OF NEW YORK,
City and County of New York, ss:

On this first day of November, one thousand eight hundred and seventy, personally appeared before me Henry Smith, to me known to be the person who executed the within assignment, and acknowledged that he executed the same.

W'M H. RICHARDS,
Notary Public.

STATE OF NEW YORK,
City and County of New York, ss:

I, Charles E. Loew, clerk of the city and county of New York,
51 and also clerk of the supreme court for the said city and county, the same being a court of record, do hereby certify that W'm H. Richards, whose name is subscribed to the certificate of the proof or acknowledgement of the annexed instrument, and thereon written, was, at the time of taking such proof or acknowledgment, a notary public in and for the city and county of New York, dwelling in the said city, commissioned and sworn, and duly authorized to take the same. And further, that I am well acquainted with the handwriting of such notary, and verily believe that the signature to the said certificate of proof or acknowledgment is genuine.

In testimony whereof I have hereunto set my hand, and affixed the seal of the said court and county, the 1st day of Nov'r, 1870.

CHA'S E. LOEW, *Clerk.*

52 U. S. circuit court, eastern district of Virginia.

HENRY SMITH, WHO SUES FOR THE BENEFIT and at the cost of Alexander Clendenin,
ag'st
THE CITY OF RICHMOND.

Henry Smith & Alexander Clendenin to Geo. P. Androus, Dr.

1871.		
April 13 to April 27.	To taking seven depositions in this cause at $10 each	$70 00
	To six adjournments at $5 each	30 00
	See com'ission and depositions	100 00

Rec'd payment from Alex. Clendenin.
Dated April 27, 1871. New York City, N. Y.

GEO. P. ANDROUS,
Commissioner.

To M. F. PLEASANTS, Esq.,
Clerk of U. S. Circuit Court for
Eastern District of Virginia.

DEAR SIR: Will you please attach above to commission as
53 returned to you as a part of the same. Mr. Steger, the plaintiff's attorney, seems to think that my fees should have been endorsed on the commission, although he is not certain as to the practice. If

this be necessary, I certify to the foregoing as being my bill, and authorize you to endorse the same on the commission, or file this therewith, as you may be advised.

I am very respectfully yours, &c.

N. Y., May 10, 1871.

GEO. P. ANDROUS,
Commissioner.

And this being all the evidence he offered here closed his case. And then the defendant offered no evidence except evidence to prove the facts alleged and set forth in said special plea, but the court refused to receive said evidence and excluded the same; to which opinion of the court refusing to receive said evidence *to which opinion of the court refusing said evidence* and excluding the same, the defendant excepted, and tendered this his bill of exceptions, and prayed that the same
54 might be signed, sealed, and reserved to him, which is done accordingly.

HUGH L. BOND, [SEAL.]
Judge of the Circuit C't of the United States for the 4th C't and Dist. of E. Virginia.

Writ of error allowed.

On motion of the defendant, by its counsel, a writ of error and appeal is allowed it to the Supreme Court of the United States from the judgment of this court pronounced against it this day upon its executing before the clerk of this court a bond in the penalty of $4,000, with good and sufficient security and conditioned according to law.

55 Circuit court of the United States of America, eastern district of Virginia.

THE CITY OF RICHMOND, PL'T'FF IN ERROR,
vs.
HENRY SMITH, WHO SUES FOR THE BENEFIT and at the costs of Alexander Clendenin, def't in error.

Know all men by these presents that we, The City of Richmond and John A. Meredith, are held and firmly bound unto Henry Smith, who sues for the benefit and at the costs of Alexander Clendenin, in the sum of four thousand dollars, to be paid to the said Henry Smith, who sues for the benefit and at the cost of Alexander Clendenin, his heirs, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals and dated this 23d day of May, A. D. 1871.

Whereas the above-named The City of Richmond hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the circuit court of the United States for the eastern district of Virginia:

Now, therefore, the condition of this obligation is such, that if the above-named The City of Richmond shall prosecute its said writ of error to effect, and answer all damages and costs if it shall fail to make good

its plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

A. M. KEILEY, *Mayor of Richmond.* [SEAL.]
JOHN A. MEREDITH. [SEAL.]

Sealed and delivered in presence of—
M. F. PLEASANTS, *Clerk.* [SEAL.]

56 (Indorsed:) No. 657. United States district of Virg. Henry Smith, who vs. City of Richm'. Bond. Filed May 23. M. F. Pleasants.

57 UNITED STATES OF AMERICA, *to wit:*

The President of the United States to the judge of the circuit court of the United States for the eastern district of Virginia, greeting:

Because, in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said court before you, between The City of Richmond, pl't'ff in error, and Henry Smith, who sues for the benefit and at the costs of Alexander Clendenin, a manifest error hath happened, to the great damage of the said The City of Richmond, as by complaint appears: We, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington, in the said district, on the first Monday of December next, in the said circuit court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error which of right and according to the laws and customs of the United States should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this 16th day of May, in the year of our Lord one thousand eight hundred and seventy-one.

M. F. PLEASANTS,
Clerk of the Circuit Court of the United States for the District of Virginia.

Approved by Hon. Hugh L. Bond, judge, &c., &c.

58 (Indorsed:) No. . United States circuit court, district of Virginia. vs. . Writ of error. To . Filed , 186 . , clerk.

59 The President of the United States of America *to wit* to Henry Smith, who sues for the benefit and at the costs of Alexander Clendenin, both citizens and inhabitants of the State of New York, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden in the city of Washington, on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Virginia, wherein The City of Richmond is plaintiff, and the said Henry Smith, who sues as aforesaid, is defendant in error, to show

cause, if any there be, why the judgment in said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Hugh L. Bond, justice of the circuit court of the United States, this 16th day of May, in the year of our Lord one thousand eight hundred and seventy-one.

[SEAL.] HUGH L. BOND,
Judge of Circuit Court of the United States for the Eastern District of Virginia.

60 Executed May 23, 1871, by serving true copy of within citation upon J. O. Steger, esq., counsel for Henry Smith, who sues, &c., &c.

DAVID B. PARKER,
U. S. Marshal,
Per JACKSON, *Dep.*

(Indorsed:) No. . United States circuit court, district of Virginia. The City of Richmond vs. Henry Smith, who sues, &c. Citation. Filed May 16th, 1871. M. F. Pleasants, clerk.

61 UNITED STATES OF AMERICA,
Eastern District of Virginia, ss:

I, M. F. Pleasants, clerk of the circuit court of the United States for the eastern district of Virginia, do hereby certify that the foregoing is a true and complete transcript of the record, process, and proceedings in a suit determined in said court, wherein The City of Richmond is plaintiff in error, and Henry Smith, who sues for the benefit and at the costs of Alexander Clendenin, is defendant.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Richmond, in said district, this 6th day of July, A. D. 1871, and of our independence the 96th year.

[SEAL.] M. F. PLEASANTS, *Clerk.*

62 UNITED STATES OF AMERICA, *to wit:*

The President of the United States to the judge of the circuit court of the United States for the eastern district of Virginia, greeting:

Because, in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said court before you, between The City of Richmond, pl'tff in error, and Henry Smith, who sues for the benefit and at costs of Alexander Clendenin, a manifest error hath happened to the great damage of the said The City of Richmond, as by complaint appears: We, being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington, on the first Monday of December next, in the said circuit court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, which of right and according to the laws and customs of the United States should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme

Court of the United States, this 16th day of May, in the year of our Lord one thousand eight hundred and seventy-one.

[SEAL.] M. F. PLEASANTS,
Clerk of the Circuit Court of the United States for the Eastern District of Virginia.

Approved by—

HUGH L. BOND,
Judge of the Circuit Court of the U. S. for the 4th Circuit, Dist. of E. Virginia.

(Indorsement on cover:) No. 362. The City of Richmond, plaintiff in error, vs. Henry Smith, who sues for the use, &c., of Alexander Clendenin. E. Virginia C. C. U. S. Filed 28th October, 1871.

REC. 362—3

SUPREME COURT OF THE UNITED STATES.

THE CITY OF RICHMOND	Plaintiff in Error.
vs.	
HENRY SMITH, USE, &c.	Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

The Circuit Court erred in overruling the demurrer to the special court in the plaintiff's declaration.

The liability of the city, if any there be, for the destruction of the plaintiff's liquors, can only be upheld upon the ground that the city made a valid contract to pay for their value. The destruction of this property was not a taking of private property for public unes, for which compensation is required to be made.

The resolves of the City Council were made and executed for the public weal, at a time of imminent peril. The rights of private property, sacred as they are, must yield to the higher demands of the public safety. In such cases *Salus populi, suprema est lex.* The proceedings, upon which the plaintiff rests his claim, are like those where an individual or a municipality *raze* houses to prevent the spread of an existing conflagration; and it is well settled that this may be done without responsibility to the owner for the damages he sustains.

In Mouses' case, 12 R. 63, Ib. 13; Lord Coke says: "For the Commonwealth, a man shall suffer damage, as for

the saving of a city or town, a house shall be plucked down if the next be on fire. This every man may do, without being liable to an action."

Dillon on Municipal Corporations; Sec. 756.

There was, therefore, no consideration for the undertaking of the city to pay the value of the liquors destroyed.

In the case of Jones & Co. vs. City of Richmond, 18th Gratt. R. 517, it was held that the city was liable to the holders of receipts given under the resolutions of the City Council. This decision is questioned by Judge Dillon in his very able treatise on Municipal Corporations, (page 366, note 1) and it is there intimated that the order for the destruction of liquors was not within the scope of the corporate powers of the city.

The Judge who delivered the opinion derives the power of the city to make the order and pledge, from the *general welfare* clause in the charter. Similar provisions are to be found in the charter of nearly every municipality in the land, and yet it is believed no case can be found where the exercise of such powers has been maintained, unless there was express authority therefor, either in the charter, or some general statute.

It is manifest that the language of this general provision must be construed with reference to the other powers granted the city, otherwise the specific grant of powers would have been useless, and it is further manifest that the power to be exercised under these general words, must be exercised by fixed by-laws, rules, or ordinances, and not by some isolated and instantaneous act.

The assertion in the opinion just referred to, that the city would have been liable as trespassers, but for its pledge to pay the value of the property destroyed, is unsupported by authority, as is shown by the cases already cited.

But if the decision of the Virginia Court of Appeals, as to the validity of this contract, be binding in this forum because it may be regarded a local question, then it is insisted that the defendant in error has not brought himself within the terms of the resolutions of the Council so as to entitle him to maintain this suit. He holds no receipt from the commissioners authorized to destroy the property.

The faith of the city is pledged only to those who hold such receipts.

The city had the right to prescribe what should be the evidence of its liability. It was a wise and most important provision, that the corporation should guard itself from such demands, preferred years after transactions had, at a period of greatest confusion, by requiring authentic evidence of the loss, and not permitting them to be asserted upon uncertain and slippery memory. The defendant in error is charged with a knowledge of the provisions of these resolutions of the Council, and if he meant to assert a claim against the city, he should have provided himself with the prescribed evidence. He alleges in his declaration that he has no receipt, but neither alleges or proves a reason for not having it. The general rule is that where a statute gives a right or provides a remedy, a party seeking its benefit must bring himself clearly within its provisions. Municipal corportitions have not unfrequently been made liable for the value of prcperty destroyed under the direction of its agents to prevent the extension of a fire. The liability in such case is purely statutory, and hence in order, to charge the corporation, the case must be brought clearly within the enactment.

Taylor vs. Plymouth, 8 Met., R., 462–465.
Hafford vs. New Bedford, 16 Gray, R. 297.
Dunbar vs. San Francisco, 1 Cal., R. 355.
Western College vs. Cleveland, 12 Ohio St. R. 375.

Thus, when the statute allows such recovery where a building is destroyed by the order of three fire directors, a destruction by the order of one of these officers, creates no liability against the corporation; and a by-law authorizing one to exercise the powers of three, in urgent cases, was adjudged void.

Coffin vs. Nantucket, 5 Cush. R., 269.

It is difficult to present a case of greater hardship than that disclosed by the record, or one where the salutary rules governing the liability of municipal corporations, should be more rigidly applied.

Under the practice in Virginia, a defendant does not lose the benefit of his demurrer by pleading over.

LEGH R. PAGE,
For the Plaintiff in Error.

Supreme Court of the United States.

DECEMBER TERM, 1872.

THE CITY OF RICHMOND, *Plaintiff in Error.*
vs.
HENRY SMITH, *to the use of A. Clendenin.*
No. 132.

Brief of Defendant in Error.

On the 2d April, 1865, the City Council of Richmond, anticipating the surrender to the Federal troops, in order to provide against the effects of drunkenness, passed resolutions for the appointment of committees of citizens to destroy all the liquor they could find, pledging the faith of the city for the payment of the value of all liquor so destroyed.

A stock of liquors belonging to the plaintiff below was destroyed by one of these committees and suit was brought against the city to recover the value.

By argument of parties a trial by jury was waived and the case heard by the court.

The court decided in favor of the plaintiff, and rendered judgment for $2832, with interest from April 3d, 1865, and costs, (Record p. 4.)

The bill of exceptions is irregular in setting out the evidence in detail. Yet it shows (Record p. 18,) that the only exception was to the refusal of the court to admit evidence to show that the plaintiff's premises were near

one of the tobacco warehouses which the Confederate Government had determined to fire. Thta said warehouses were fired, and the plaintiff's stock of liquors would have been destroyed by fire from the neighboring warehouse, if they had not been destroyed by the committee.

This is the sole point in the case, and we submit that the defendant below cannot avail itself of it. If it can, then a person accused of larceny of goods from a burning building might claim an acquittal by showing that if he had not stolen the goods, they would have been destroyed by fire, and that he was a public benefactor, having preserved property from destruction. Or, an Insurance Company might claim exemption from its contract, on showing that if the insured property had not been destroyed by fire, it would have been swept away by a flood. Such cases might be multiplied ad infinitum. It is respectfully submitted that no such absurd rule of law prevails; that the writ of error was sued out for delay; and that the defendant in error is entitled to an affirmance of the judgment with ten per centum damages under the rule of this court.

WM. F. MATTINGLY,
Att'y for Deft. in Error.